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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICI CURIAE* OF ALLIEDSIGNAL INC., THE LTV CORPORATION AND BELLAIRE CORPORATION, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Each of tne three *amici* formerly mined coal under National Bituminous Coal Wage Agreements ("NBCWAs") signed with the United Mine Workers of America ("UMWA") and have therefore been charged with liability for retiree health benefits by the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 ("Coal Act").

AlliedSignal Inc. ("Allied") last signed a NBCWA in 1978 and stopped mining coal in 1980. During litigation spawned by its exit from the industry, Allied obtained a judgment that its funding obligations continued "only for the life of the 1978 contract" and thus had expired in 1981. *See District 17, UMWA v. Allied Corp.*, 765 F.2d 412, 417 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985). The Fourth Circuit ordered Allied to continue funding certain retiree health benefits, however, as a remedy for Allied's breach of an entirely separate provision. *See id.* To resolve this disputed obligation, Allied entered into a consent judgment in which it agreed, notwithstanding the earlier ruling, to provide health benefits to retirees from a single mine. The Coal Act now requires Allied to provide lifetime health benefits to retirees at a total estimated cost of $50 million.

The LTV Corporation and its subsidiaries ("LTV") last signed a NBCWA in 1984 and stopped mining coal in 1987. The Second Circuit subsequently ruled that LTV's obligations to pay for retiree health benefits had ended when the 1984 NBCWA expired. *LTV Steel Co. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1208 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992). Shortly after this decision, the Coal Act reimposed a duty

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[1] Counsel for all parties have consented to the filing of this amicus brief, and *amici* have filed those consents with the Clerk of Court. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6.

on LTV to pay approximately $140 million to UMWA retirees.

Bellaire Corporation, whose ultimate parent is Nacco Industries, Inc., and its related companies ("Bellaire") last signed a NBCWA in 1984 and stopped mining bituminous coal in 1988. When Bellaire sold its last bituminous coal mining operations, as part of a severance arrangement with the union, Bellaire agreed to provide health benefits, but only through January 1990. The Coal Act now requires Bellaire to provide lifetime benefits at an estimated total cost of $100 million, and Bellaire has no way to pass any of those costs through to utilities who operated many of Bellaire's mines (and purchased its coal) decades ago under cost pass-through contracts. This amount is about nine times greater than Bellaire actually contributed under the NBCWAs and seventy times greater than the average annual profits Bellaire made from coal mining.

Accordingly, each of the *amici* has been subjected to many millions of dollars in liabilities imposed under the Coal Act on the basis of conduct that occurred years earlier. *Amici* file this brief to demonstrate that the Coal Act's retroactive obligations cannot be constitutionally justified.

ARGUMENT

THE COAL ACT IS UNCONSTITUTIONAL BECAUSE IT RETROACTIVELY TRANSFERS SUBSTANTIAL ASSETS BETWEEN NARROW CLASSES OF PARTIES WITHOUT ANY JUSTIFICATION BASED UPON THOSE PARTIES' PRIOR DEALINGS OR EXPERIENCE

The Coal Act exemplifies the sort of arbitrary legislative transfer of property that the Due Process and Takings Clauses condemn. The Act uniquely combines three characteristics that, taken together, have never been sustained by this Court. Without restating the framework of analysis applicable to the constitutional protections, which is fully set forth in Petitioner's Brief, *amici* will

instead identify and discuss these three unique features of the Act, whose arbitrary effects exacerbate each other with a cumulative impact wholly unprecedented in the cases of this Court.

First and most important, the Coal Act's requirement that companies pay lifetime health benefits for persons employed in the distant past (as well as their dependents) has no rational justification. Notwithstanding the unexamined comments of several appellate courts (including the court below) to the contrary, there is no basis, legal or moral, on which to justify placing this grossly disproportionate burden on the former employers. Those parties at no time agreed to provide the benefits at issue, and they certainly cannot be charged with responsibility for causing the need for comprehensive medical care in retirement, which is a need shared by all persons and not just by those who have been coal miners, unlike the black lung benefits at issue in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

Second, the Coal Act's obligations are imposed over a breathtaking, retroactive span of several decades. Parties like Eastern Enterprises who employed their last miner in the 1960's—and indeed others who are being charged for people they last employed just after World War II—surely had their reasonable investment backed expectations shattered when they learned in 1992 that major new obligations had been created on the sole basis of those ancient employment relationships. This Court finds legislation retroactive only reluctantly and views it with special concern. The Coal Act's retroactivity is remarkable in the extreme.

Third, as legislation shifting obligations among small groups of individuals and corporations, the Coal Act has the character of legislation for the private benefit of a few at private rather than public expense. This transformation of a public expense into a private one demands the special attention of this Court.

On these grounds, *amici* submit, the Coal Act must be struck down as applied to Eastern and others similarly situated. By so doing, the Court would open no Pandora's box nor in any way call into question its long line of authority reaffirming Congress's broad powers to enact economic legislation. On the contrary, by presenting the exceptional case where Congress has crossed the line of limitation established by rational basis review, the Coal Act confirms the value and importance of the constitutional scrutiny for minimum rationality. A deferential standard of review does not mean no review at all, *see United States v. Lopez*, 514 U.S. 549, 556-57 (1995), and under any appraisal of the Coal Act's fairness and rationality, it cannot stand.

A. The Imposition of Obligations Under the Coal Act Is Not Supported by Any Preexisting Contractual or Moral Obligation, or by Any Basis in the Parties' Prior Dealings or Experience

At virtually every step, the court below based its analysis on the premise that Eastern somehow contributed to an expectation of—or perhaps expressly promised—lifetime benefits to retirees and their beneficiaries. That assumption was central to both its due process [2] and takings [3] analyses. The available evidence does not remotely support such a conclusion. Apart from the cursory mention of several important contractual provisions, Pet. App. A-4, the court below made no further direct reference to any relevant NBCWA. Whether this Court examines only the agreements before 1965, when Eastern exited the coal industry, or later NBCWAs, there is simply no evidence of such promises, or of any other basis from which a legal or moral obligation can be inferred. The courts too often have accepted without analysis [4] the assertions of the Coal Commission to the contrary.[5] Absent such a presumed relationship between miners' expectations on the one hand and the conduct of Eastern and other companies on the other, there is no rational basis on which the Coal Act can withstand constitutional scrutiny.

[2] *See* Pet. App. A-13 ("Since Eastern, as a signatory of the earlier NBCWAs, contributed directly to mine workers' legitimate expectations of lifetime health benefits, requiring it to pay for the realization of those expectations is hardly irrational."); *id.* at A-15 ("If the expectations [of lifetime benefits] had not been created by Eastern and its counterparts, the need for the later plans, and eventually for the Combined Fund, would never have arisen.").

[3] *See id.* at A-21 ("Eastern's liability will be roughly proportionate to the expectation of health benefits that it created and which have been satisfied by the industry since 1950 in a series of multiemployer plans."); *id.* at A-22 ("Having contributed to the expectation of lifetime health benefits for miners, Eastern had every reason to anticipate that it might be called upon to bear some of the financial burden that this expectation engendered.").

1. *The NBCWAs Themselves and the Historical Evidence Establish Beyond Any Doubt That No Reasonable Expectations of Lifetime Health Benefits Were Created Before 1974*

Prior to 1978, retiree health benefits in the unionized sector of the bituminous coal industry were provided through a multiemployer plan and funded on a pay-as-you-go basis through contributions from all current NBCWA signatories. Each employer's duty to contribute to the plan was always based on its current coal production, and that duty was expressly and repeatedly limited to the term of the current agreement. *See, e.g.*, RA at

[4] *See, e.g., Holland v. Keenan Trucking Co.*, 102 F.3d 736, 741 (4th Cir. 1996); *Blue Diamond Coal Co. v. Secretary of Health & Human Servs. (In re Blue Diamond Coal Co.)*, 79 F.3d 516, 519 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 488 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995).

[5] The Coal Commission report must be read in light of the interests of those who served on the Commission. The coal industry nationwide was represented only by persons affiliated with the UMWA and with signatories to the then-current wage agreement. The Commission found that legislation was needed to meet the costs of retiree benefits agreed to in the most recent NBCWA and justified that conclusion by reference to promises of lifetime benefits for which there is no factual basis.

618 (1947 NBCWA), 630 (1948 NBCWA), 638 (1950 NBCWA), 668 (1950 NBCWA, as amended 1964). Retiree health and pension benefits were paid from the same fund as benefits for current employees, and the employer's obligation was wholly unrelated to how many retirees, if any, were eligible for benefits.

This multiemployer, pay-as-you-go system, which began in 1947, was tailored to the coal industry's unique nature:

> The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers retirement benefits *without linking specific workers to specific employers.* They have done this through national, multi-employer agreements between the [UMWA] and a multi-employer association of coal producers, the Bituminous Coal Operators Association [("BCOA")]. All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds *without reference to the employers they happened to be working for at the time of their retirement.*

Connors v. Link Coal Co., 970 F.2d 902, 903 (D.C. Cir. 1992) (emphasis added). This system assured retirees whatever benefits the current NBCWA established, only during and limited to the life of that agreement.

Yet, as the First Circuit recognized below, Pet. App. A-13, nothing in the agreements imposed any contractual obligation on the signatory employers beyond the term of the agreement. The NBCWAs state unambiguously that all rights and duties created—including (1) retirees' rights to health benefits and (2) employers' duties to contribute—expired at the end of each NBCWA. The agreements bound their signatories to contribute to health benefits on a per-ton basis only "during the life of [each] Agreement." *See, e.g.*, RA at 638 (1950 NBCWA), 668 (1950 NBCWA, as amended 1964), 688 (1950 NBCWA, as amended 1966), 706 (1968 NBCWA), 729 (1971 NBCWA).

Most importantly, beneficiaries were not assured of any particular level of benefits. Instead, the fund trustees had "full authority" to alter, add and terminate these benefits. *See* RA at 639 (1950 NBCWA), 707 (1968 NBCWA) 730 (1971 NBCWA). Eastern thus signed NBCWAs reflecting the expectation that once a contract had expired, the operator would have no additional retiree benefit obligations.

Thus, even if miners and retirees assumed that they would be assured health benefits in perpetuity, this belief was unsupported by the agreements negotiated on their behalf. Moreover, while their formidable union certainly fought hard for the benefits they desired, it was not obligated to continue to do so at each subsequent contract negotiation. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 (1971). Therefore, as Eastern's brief demonstrates, there is no rational basis for imposing liability on Eastern to pay for benefits based on allegations that its retirees misperceived the NBCWA's terms.

2. *Looking Beyond 1974, the NBCWAs Expressly Limited the Obligations Undertaken to the Life of the Agreement*

Lower courts upholding the Coal Act have erroneously justified their decisions by reference to a supposed commitment to provide lifetime benefits beginning with the 1974 and 1978 NBCWAs.[6] But even if the Court looks to those agreements, the conclusion is the same: there was no obligation. To be sure, the plans did become more complex, largely in response to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461

[6] The 1981 and 1984 NBCWAs, which are not in the record, impose essentially the same obligations as the 1978 NBCWA.

("ERISA").[7] Moreover, after 1978, the health care plans changed toward a decentralized system in which post-1974 and future retirees would now receive benefits from individual plans operated by their last signatory employer. The multiemployer plans were retained, nevertheless, to provide benefits for miners who, because their employers had left the industry, would otherwise receive no health benefits. RA at 778-79 (1978 NBCWA). Most important, those multiemployer plans continued to be funded only by current NBCWA signatories through contributions that continued to be limited to the "life of th[e] agreement."

a. *The Obligation to Contribute Was Limited to the Life of the Agreement*

The provision of the NBCWA addressing employers' obligations to contribute limited those obligations in three key respects. First and most importantly, by its terms, the contribution requirement applied only "[d]uring the life of this Agreement." RA at 749 (1974 (NBCWA), 779 (1978 NBCWA).[8] Second, the same provision specifically required contributions only by "each *signatory* Employer." RA at 749, 779 (emphasis added). It made no reference to signatories of previous NBCWAs. The NBCWA later described the contribution requirement in similar terms: "This obligation of each Employer *signatory hereto*, which is several and not joint, to so pay such sums shall be a direct and continuing obligation of said Employer *during the life of this Agreement* . . . ." RA at 752 (1974 NBCWA), 783 (1978 NBCWA) (emphasis added). Based on these two limitations, if a company declined to

[7] The 1974 NBCWA split the UMWA trust fund into four separate trusts, two providing pensions and two providing welfare and health benefits. The welfare and health benefit plans were the 1950 Benefit Plan and Trust, which covered those retiring before 1976, and the 1974 Benefit Plan and Trust, which covered those retiring later. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 566 (1982); RA at 748-49.

[8] Certain contributions were required for a shorter period of time, but none extended beyond the NBCWA's termination date.

join the next multiemployer bargaining unit, it clearly would have had no contribution obligation after the agreement it signed expired. Third, each NBCWA determined a signatory employer's contribution solely on the basis of detailed production-based measures.[9] Thus, if a company ceased bituminous coal mining altogether, as virtually all of the companies burdened by the Coal Act did, its obligation to contribute would effectively end, even without regard to the other two express limitations.

[9] The 1974 NBCWA shifted from a pure per-ton contribution rate to a formula based on both tonnage produced and hours worked. The 1974 NBCWA provided in part:

> (1) *During the life of this Agreement*, for the periods of time indicated below, each signatory Employer engaged in the production of coal shall contribute . . . the amounts specified below based on cents per ton . . . coal produced by such Employer for use or for sale, and, in addition, each signatory Employer (including those engaged in the production of coal and those not engaged in the production of coal) shall contribute to the Trusts established in this Article the amounts specified below based on cents per hour worked by each of the Employer's Employees who perform classified work under this Agreement:
>
> * * *
>
> (ii) Into the 1950 Benefit Trust: for the period beginning December 6, 1974, . . . and ending December 6, 1976, 18.0¢ per ton on each such ton; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 19.0¢ per ton on each such ton;
>
> * * *
>
> (iv) Into the 1974 Benefit Trust: for the period beginning December 6, 1974, and ending December 6, 1975, 70.8¢ per hour on each such hour worked; for the period beginning December 6, 1975, and ending December 6, 1976, 77.0¢ per hour on each such hour worked; and for the period beginning December 6, 1976, and ending when this Agreement is terminated, 88.0¢ per hour on each such hour worked.

RA at 749 (emphasis added); *see also, e.g.*, RA at 779-80 (1978 NBCWA). In 1988, the NBCWA changed the formula to a pure hourly basis. RA at 820.

b. *The Beneficiaries' Right to Coverage Existed Only During the Term of the Agreement*

Like the employers' obligations, the beneficiaries' coverage was also at every relevant point explicitly limited to the term of the agreement. For example, although the 1978 NBCWA defined benefit levels, it required only that, under the individual employer plans, "benefits . . . shall be guaranteed *during the term of this Agreement* by each Employer at levels set forth in such plans." RA at 778 (emphasis added). Likewise, with respect to miners covered by the multiemployer plan, the Agreement stated: "The 1974 Benefit Plan and Trust shall continue . . . for the sole purpose of providing health and other non-pension benefits, *during the term of this Agreement*, to any retired miner . . . who would otherwise cease to receive the health and other non-pension benefits provided herein . . . ." *Id.* (emphasis added).

c. *The Guarantee Clause Imposed Obligations Only During the Term of the Agreement*

Beginning in 1978, the NBCWA included a separate provision, known as the "guarantee clause," in which the employers guaranteed certain benefit levels. *See* RA at 787-88 (1978 NBCWA), 828 (1988 NBCWA).[10] Like

[10] The guarantee clause read:

> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.*
>
> In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX *during the term of this Agreement.* These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto *during the term of this Agreement.*

RA at 787-88, 827-28 (emphasis added).

the contribution provisions discussed above, however, the guarantee clause contained two key limitations. First, the benefits were guaranteed only "during the term of this Agreement." RA at 787-88, 828. Indeed, although some courts, including the court below, have relied on the guarantee clause to support the Coal Act's perpetual burdens, *see, e.g.*, Pet. App. A-4; *Davon, Inc. v. Shalala*, 75 F.3d 1114, 1118 (7th Cir.), *cert. denied*, 117 S. Ct. 50 (1996); *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 483 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995), the only one to have discussed the terms of the clause recognized that any "guarantee" existed "only until the expiration of that Agreement," *id.* Second, the guarantee clause required any necessary increased contributions to "be made by all Employers *signatory hereto*"—thus expressly excluding former signatories. *Id.* at 788 (1978 NBCWA), 828 (1988 NBCWA) (emphasis added).

This understanding of the guarantee clause has been repeatedly confirmed in court decisions applying it. Thus, the courts have, at the insistence of the benefit funds' trustees, specifically enforced the guarantee clause against current signatories, requiring them to increase their contributions to make up a shortfall in the UMWA funds.[11] In contrast, the courts have repeatedly rejected the trustees' attempt to apply the guarantee clause to require companies to pay benefits to their former employees beyond the life of the NBCWAs that the companies signed.[12]

[11] See *McGlothlin v. Connors*, 142 F.R.D. 626, 646 (W.D. Va. 1992); *UMWA 1950 Benefit Plan & Trust v. Bituminous Coal Operators' Ass'n*, 898 F.2d 177, 181 (D.C. Cir. 1990).

[12] *UMWA v. Nobel*, 720 F. Supp. 1169, 1180 (W.D. Pa. 1989), *aff'd*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991); *see also LTV Steel Co. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1210 (2nd Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992); *District 29, UMWA v. Royal Coal Co.*, 768 F.2d 588, 592 (4th Cir. 1985); *District 29, UMWA v. UMWA 1974 Benefit Plan & Trust*, 826 F.2d 280, 282-83 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988); *Schifano v. UMWA 1974 Benefit Plan & Trust*,

d. *The Termination Clause Contemplated That Benefits Would End With the Contract*

Finally, the section of the NBCWA addressing the manner in which the agreement may be terminated clearly indicates that the contribution obligation does not survive the termination of the agreement. The clause in the 1978 NBCWA, for example, contains a single specific exception for the continuation of health benefits beyond the agreement's termination, which states that in the event of an economic strike, employers must continue benefits for 30 days, after which the employees must pay for the benefits. RA at 797-98; *see also* RA at 858-59 (1988 NBCWA). If the contracts were intended to require former signatories to provide health benefits after the agreement expired in any circumstances other than this 30 day provision relating to economic strikes, it is inconceivable that such an intention would not likewise have been made explicit.

e. *The "Health Services Card" Language and "Evergreen" Clause Are Not to the Contrary*

The only allusion at all to lifetime entitlements in the NBCWAs, first inserted in 1974, is found in a "General Description of the Health and Retirement Benefits." RA at 788 (1978 NBCWA), 829 (1988 NBCWA). This description provides that a pensioner fitting a certain description "will be entitled to retain his Health Services card until death, and upon his death, his widow will retain a Health Services card until her death or remarriage." *See* RA at 755 (1974 NBCWA); 788-91 (1978 NBCWA); 830-31, 833 (1988 NBCWA). Some courts have seized upon this language as evidence of a promise of lifetime health benefits. *See, e.g., In re Chateaugay*, 53 F.3d at 482. Yet this language does not guarantee a particular level of health benefits, or indeed any benefits at all.

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655 F. Supp. 200, 204 (N.D.W. Va. 1987); *Box v. Coalite, Inc.*, 643 F. Supp. 709, 711-12 (N.D. Ala. 1986).

Providing a health card for life does not guarantee certain benefits but instead simply assures that miners and retirees will be entitled to participate in whatever benefits plan, if any, is in effect. Such a provision makes sense in an industry where employers and employees come and go as mines are exhausted. *See Connors*, 970 F.2d at 903. Indeed, to the extent that this system ensured that miners' benefits went with them when they changed employers—or, in modern terms, were "portable"—the NBCWAs addressed a problem that is arguably becoming more widespread in society. *See generally* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. Such a system does nothing however, to alter the expectation that any particular benefit level is limited to the term of a particular agreement, as the NBCWAs and summary of benefits both made clear.

Thus, as far as retired miners and their beneficiaries were concerned, provision of the health card for life ensured that they would not be cut loose by the union and the signatory coal companies—that instead they would participate in the same health benefits program as active miners, even if the particular companies they worked for long ago folded or left the industry. This commitment's value depended on the union's ability to continue to negotiate contracts providing generous retiree benefits. Coal miners may have placed considerable faith in that ability, but whatever they expected their union to achieve in the collective bargaining process is not attributable to any promise or conduct by their employers or former employers. Nothing in the agreement suggests otherwise. To the contrary, the Description of Benefits itself made clear that the term of health benefits was limited, distinctly declaring that health "benefits are guaranteed *during the term of this Agreement, subject to the terms of this Agreement*." RA at 792 (1978 NBCWA), 836 (1988 NBCWA) (emphasis added).

Moreover, the NBCWAs make clear that this section merely attempted to summarize the trust fund documents and was not independently binding:

> This description is intended merely to highlight certain information; it is not a complete statement of all of the provisions of the Plans and Trusts, nor is it intended to be a Summary Plan Description as defined in the Employee Retirement Income Security Act of 1974, and is qualified in its entirety by, and subject to the more detailed information contained in the Plans and Trusts . . . .

RA at 788 (1978 NBCWA), 829-30 (1988 NBCWA); *see also* RA at 759 (1974 NBCWA).

Similarly, the so-called "evergreen clause" created no obligation, moral or otherwise, with respect to benefits after a particular agreement expired. That provision required employers whose employees participated in the pension or benefit plans to comply with the terms of the trusts, including "making the contributions required under the [current] National Bituminous Coal Wage Agreement . . . as amended from time to time, and any successor agreements thereto." *See UMWA 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469, 471-72 n.1 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993). It was inserted in the pension and benefit plan documents (not the NBCWAs themselves) shortly after the 1978 NBCWA was signed and ratified. Some courts, including the court below, *see* Pet. App. A-4; *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1127 (4th Cir. 1996); *In re Chateaugay*, 53 F.3d at 483, have supported the Coal Act's constitutionality by finding in the "evergreen clause" a promise of perpetual health benefits.

When the clause was added to the pension and benefit trusts in 1978, however, it did nothing to change the traditional allocation of responsibility for retiree benefits, under which current NBCWA signatories jointly shared the costs of retiree health benefits. Because the clause merely refers to the "contributions required under" the NBCWA, it imposes no independent obligation to contribute beyond that set forth in the relevant NBCWA section. As explained above, the NBCWA contains several key limitations to the effect that employers were required

only to contribute "during the life of the Agreements." Those are squarely contrary to any perpetual liability theory, and indeed the NBCWAs contain not the slightest hint that any obligation continued after the life of the agreement.

Additionally, the "evergreen clause" by its terms reflects an understanding that it applies against only current signatories because the contribution obligation that it incorporates was always defined in terms of coal production. If a former signatory no longer mined bituminous coal, there would be no basis for assessing any contribution obligation.[18] For that reason, an earlier Federal Respondent recognized:

> The evergreen clauses did not create any obligation to contribute for companies . . . that left the coal mining industry because the Wage Agreements generally required contributions to the benefit plans on a per-ton-of-coal-mined and coal-miner-hours-worked basis. Any party who had ceased coal mining operations . . . thus would no longer be obligated to make contributions.

Br. for Secretary of Health and Human Servs. at 6-7, n.* (citations omitted), *In re Chateaugay Corp.*, 53 F.3d 478.

3. General Labor Law Practices and the Parties' Course of Dealing Confirm That Benefits and Obligations Were Limited to the Life of the Agreement

Extrinsic evidence confirms that retiree health benefits were "negotiated on a contract-by-contract basis," as the Fourth Circuit has recognized. *District 17, UMWA v. Allied Corp.*, 735 F.2d 121, 126 (4th Cir. 1984), *vacated on other grounds*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 473 U.S. 905 (1985). In that case, a negotiator for the UMWA, when asked specifically about retiree

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[18] Indeed, the only decision upholding "evergreen" liability, *UMWA 1974 Pension Trust v. Pittston Co.* (*In re UMWA Employee Benefit Plans Litig.*), 782 F. Supp. 658 (D.D.C. 1982), *aff'd*, 984 F.2d 469 (D.C. Cir.), *cert. denied*, 509 U.S. 924 (1993), did so against three companies still engaged in bituminous coal mining.

health benefit levels, testified that "[e]verything is open for renegotiation at the end of the contract." The chief employer negotiator agreed that the parties always had "negotiate[d] on the basis of the term of the contract" and could have agreed, in a future NBCWA, "to provide no benefits for retirees." *Id.* at 126-27.

This course of dealing, and the explicit contract language limiting the term of obligations created, is entirely consistent with fundamental labor law principles under which the parties' decisions to negotiate a collective bargaining agreement—or a series of them—do not create contractually enforceable commitments that extend beyond the terms of their agreements. Thus, this Court has held that, under ERISA, obligations to contribute to a plan "will cease, in the ordinary course, upon termination of the bargaining agreement," *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) (discussing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548-49 (1988); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.").

Exceptions to this rule are found only when commanded by the "explicit terms" of the collective bargaining agreemnt. *Litton*, 501 U.S. at 207; *see In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 901 (3d Cir. 1995); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), *cert. denied*, 514 U.S. 1057 (1995); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993). Courts have thus held that the commitments of these specific NBCWAs, as with other "[e]mployer obligations and employee rights, under a collective bargaining agreement, do not survive the expiration of the agreement absent a clear indication of the parties." *Allied Corp.*, 735 F.2d at 127.

Moreover, in general, an employer cannot be forced to continue in multiemployer bargaining arrangements based

on its participation in predecessor agreements. Multiemployer units with voluntary membership are traditional vehicles for collective bargaining. *NLRB v. Truck Drivers Union (Buffalo Linen)*, 353 U.S. 87, 94-95 (1957). As this Court has ruled, multiemployer bargaining "neither forces employers into multiemployer units nor erects barriers to withdrawal prior to bargaining." *Charles D. Bonnano Linen Serv. v. NLRB*, 454 U.S. 404, 412 (1982). So when each NBCWA expired, each company was free to leave the multiemployer bargaining unit and bargain with its employees separately, as employers regularly did.

There are good reasons for limiting obligations to the term of the collective bargaining agreement. As then-Judge Breyer noted, indefinite obligations are "particularly inappropriate in the field of labor relations, where fluctuating economic circumstances ordinarily call for the ability to adapt to changes." *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 638 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982). These concerns are particularly acute with health care coverage, which "must take account of inflation, changes in medical practice and technologies and increases in the costs of treatment depending on inflation"—factors that "prevent accurate predictions of future needs and costs." *Wise*, 986 F.2d at 935 (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). They are especially relevant in an extractive industry like bituminous coal mining where employers may simply shut down when their resources are depleted.

Courts have thus repeatedly confirmed that "the coal company's responsibility to provide health benefits to retired employees under a negotiated [NBCWA] terminated with the expiration of that Wage Agreement," [14] and have

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[14] *In re Chateaugay Corp.*, 945 F.2d at 1210; *see UMWA 1974 Benefit Plan & Trust*, 826 F.2d at 282; *Royal Coal Co.*, 768 F.2d at 590-92; *Allied Corp.*, 765 F.2d at 417; *Nobel*, 720 F. Supp. at 1176-78; *Schifano*, 655 F. Supp. at 204; *Box*, 643 F. Supp. at 711-12.

refused to impose obligations on employers who have not signed successor Agreements to pay for health benefits through the Benefit Trust. In one case, the Second Circuit declared that *amicus* LTV Corporation was not required to pay into the health benefit fund when it stopped agreeing to do so. *LTV Steel Corp. v. UMWA (In re Chateaugay Corp.)*, 945 F.2d 1205, 1209 (2d Cir. 1981), *cert. denied*, 502 U.S. 1093 (1991). The Coal Act then imposed liability on LTV based on an assumption that it had promised to continue to pay for lifetime health benefits, when in fact the Second Circuit had already decided that LTV had made no such promise.

B. The Coal Act Imposes Burdens Retroactively Upon Completed Conduct, Over a Span of Several Decades

The arbitrariness of the Coal Act's burdens, imposed as they are without any rational basis in antecedent obligations or conduct, is greatly aggravated by the Act's remarkable retroactive reach. Because the Coal Act " 'creates a new obligation . . . in respect to transactions or considerations already past,' " it " 'must be deemed retrospective.' " *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (C.C.N.H. 1814) (Story, J.)). When the Coal Act was enacted in October 1992, Eastern could do nothing to conform its conduct to avoid future liability. The liability of Eastern under the Act was based solely on past acts—Eastern's fully satisfied undertakings between 1947 and 1965 to make specified contributions to a retiree health benefit plan during that discrete time frame.[15]

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[T]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process,

[15] *Amicus* Allied stopped mining coal a dozen years before the Coal Act passed, and the other *amici* were subjected to somewhat shorter, though still unprecedented periods of retroactivity.

and the justifications for the latter may not suffice for the former." *Turner Elkhorn*, 428 U.S. at 17; *see Landgraf*, 511 U.S. at 266; *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) ("retroactive legislation does have to meet a burden not faced by legislation that has only future effects"). This scrutiny of retroactive legislation is "an essential thread in the mantle of protection that the law affords the individual citizen," *Lynce v. Mathis*, 117 S. Ct. 891, 895 (1997), and one of our most "elementary considerations of fairness":

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

Landgraf, 511 U.S. at 265 (footnotes omitted); *see Hughes Aircraft Co. v. United States ex rel Schumer*, 117 S. Ct. 1871, 1876 (1997); *BMW v. Gore*, 116 S. Ct. 1589, 598 (1997); *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

It is because, as Justice Story succinctly observed, "[r]etrospective laws are, indeed, generally unjust," 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1994), that the Ex Post Facto Clause flatly prohibits the retroactive imposition of criminal liability, *see, e.g., Weaver v. Graham*, 450 U.S. 24, 28 (1981). Also for that reason, this Court applies a "very strong" presumption that a civil statute "was not meant to act retrospectively," *United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) (citation and quotation omitted).[16]

[16] *See also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.) ("a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936) ("[L]aws should not be enforced

Among the most disfavored retroactive statutes are those affecting contractual relationships: "matters in which predictability and stability are of prime importance." *Landgraf*, 511 U.S. at 271. With a decades-long period of retroactivity, the Coal Act clearly "sweep[s] away settled expectations," *id.* at 266, as to these relationships. Many former NBCWA signatories no longer mine bituminous coal at all and thus can no longer pass along the sudden Coal Act liabilities into the product's price. Also, the signatories did not operate in a vacuum but instead operated under a complex skein of contractual relationships. For example, some merely owned the mines and sold the coal to operator-utilities who actually managed and ran the mines and contractually assumed all related liabilities. Most of those contracts terminated long ago and many parties involved no longer exist, making it impossible to recover on the cost pass-through provisions. Because of the extraordinary span of its retroactivity, the Coal Act thus imposes obligations based on a particular historical relationship when virtually all surrounding contractual context, under which many parties shared or reallocated particular risks, has vanished.

Thus, the Coal Act is unprecedented in its imposition of wholly new obligations unjustified by the prior conduct of the parties, on the basis of events that ended years, or in many cases, decades earlier.

C. The Coal Act Effects a Direct Transfer of Substantial Assets Between Narrow Classes of Parties

The Coal Act entitled one extremely narrow class of persons—UMWA retirees who worked under one or more wage agreements signed with BCOA members—to receive a benefit that few Americans enjoy as a matter of right. No one questions the power of Congress to single out particular groups to receive certain benefits—even benefits as unusual as the generous lifetime medical benefits conferred by the Coal Act. The question, though, is who

before the subjects have an opportunity to become acquainted with them.") (citing 1 William Blackstone, *Commentaries* *46 (1765)).

must pay for such congressional generosity. Eastern's liability alone is estimated at over $100 million. Pet. App. A-20. The pre-1988 signatories as a group have thus far been assessed approximately $60 million *per year* to fulfill the Coal Act's mandates. *See* Staff of the House Comm. on Ways and Means, 104th Cong., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, at 23, 31, 33 (Comm. Print 1995) (reflecting billings of $62,027,326 for fiscal year 1994 and similar premium levels for fiscal year 1995). That amount is a direct savings to the BCOA companies over what they would have been obligated to pay under the 1988 Wage Agreement.[17]

The legislature's "unmatched powers . . . to sweep away settled expectations suddenly and without individualized consideration," *Landgraf*, 511 U.S. at 266, pose special dangers "in the hands of enterprizing and influential speculators," The Federalist No. 44, p. 301 (J. Cooke ed. 1961). Indeed, the particular advantage from the viewpoint of those who promote a retroactive statute is that it "'may be passed with an exact knowledge of who will benefit from it.'" *Landgraf*, 511 U.S. at 267 n.20 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 693 (1960)).

Here, that is exactly what happened. The BCOA, which included the largest coal producers in the United States, such as Consolidation Coal (a duPont subsidiary), Peabody Coal Co., and Cyprus Amax, succeeded in persuading Senator Rockefeller and Congress as a whole to relieve it of the obligations to finance retiree health bene-

[17] Paul W. MacAvoy has stated concerning the Coal Act: "The Reachback provision was, and continues to be, an unjustifiable tax on other firms that lowers the cost of health care payments by coal companies that signed the 1988 NBCWA contract". *Coal Industry Retiree Health Benefit Act of 1992: Hearing Before the Subcomm. on Oversight of the House Ways and Means Comm.*, 104th Cong. 189 (1995) (Statement of Paul W. MacAvoy On Behalf of The Reachback Tax Coalition) ("MacAvoy Statement").

fits that it had voluntarily taken on in the 1988 NBCWA, an agreement still in effect when the Coal Act became law. The diverse companies on whom the burden fell were ill-equipped to resist the BCOA and UMWA's combined influence.[18]

The exceptionally narrow class of former employers burdened under the Act, the equally narrow class of then-current Wage Agreement signatories whose contractual burdens the Coal Act lightened, and the highly focused character of the beneficiary class together give the Coal Act the character of a simple reallocation of resources from one party to another. Such enactments have been long deemed impermissible under our Constitution. *See, e.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Opinion of Chase, J.) (statutes cannot "tak[e] property from A. and giv[e] it to B"); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) (statute cannot merely balance "the private economic interests of coal companies against the private interests of the surface owners"); Laurence H. Tribe, *American Constitutional Law* § 9-2, at 588 (2d ed. 1988) (noting "constitutional law's undisputed condemnation" of law that "take[s] property from A and give[s] it to B").[19]

[18] The court below saw this legislation as an effort to restore "labor peace" by avoiding "wrangling over the provision of health care benefits for retired mine workers." Pet. App. A-12. There is a certain logic to that approach: doubtless one of the easiest ways for labor and management to resolve their differences over benefits is to find, with the help of Congress, a third party to pay for them. As Paul MacAvoy observed, the Coal Act "is unjustifiable because it solves neither a market failure nor a contractual incompleteness problem. The Act was passed to solve an alleged funding crisis which never existed and to fund the benefits of orphan retirees whose health care benefits were already contractually provided for in existing health benefit funds." MacAvoy Statement at 189.

[19] This retroactive legislation is all the more illegitimate because it was specifically targeted to "correct" decisions such as *In re Chateaugay Corp.*, 945 F.2d 1205, which had released coal companies from liability to pay lifetime health benefits to the same retirees that the Coal Act now forces them to pay. To the extent that the Coal Act was premised on the narrow task of reversing these decisions, the Coal Act implicates many of the same concerns about legislative interference with final court judgments that underlay this Court's decision in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The Coal Act, in essence, reopened final judgments precisely because it did not "make general law," *id.* at 224, but instead required transfers between narrow groups based on their contractual promises—"taking property from A and giving it to B"—when courts had already adjudicated that the contracts did not require such transfers between A and B.

While Congress could certainly accomplish the objective of aiding the retiree miners and their dependents who are the Coal Act's beneficiaries—and could probably do so without aiding the millions of other citizens in their advancing years who find themselves without adequate provision for comprehensive medical care—absent pre-existing obligations, it may not simply impose the resulting burden on another group of private entities:

> The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities—a problem caused by the society at large—has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," *Armstrong*[*v. United States*, 364 U.S. 40, 49 (1960)], this is the only manner that our Constitution permits.

Pennell v. City of San Jose, 485 U.S. 1, 21-22 (1988) (Scalia, J., joined by O'Connor, J., concurring in part and dissenting in part).[20] The Coal Act singles out pre-1988 Wage Agreement signatories like Eastern to privately fund the solution of problems for which they simply are not responsible. *Cf. Nollan v. California Coastal Comm'n*,

[20] The *Pennell* majority dismissed a takings challenge on ripeness grounds but did not disagree on the merits with Justices Scalia and O'Connor's straightforward application of takings law's bedrock or guiding principle. *See* 485 U.S. at 8-11.

483 U.S. 825, 835 n.4 (1987). The Coal Act thus forces companies like Eastern to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the decision below.

Respectfully submitted,

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